

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

AMEREN TRANSMISSION COMPANY OF ILLINOIS	)	
	)	
Petition for a Certificate of Public Convenience and	)	
Necessity, pursuant to Section 8-406.1 of the Illinois	)	
Public Utilities Act, and an Order pursuant to Section 8-	)	
503 of the Public Utilities Act, to Construct, Operate and	)	Docket No. 12-0598
Maintain a New High Voltage Electric Service Line and	)	
Related Facilities in the Counties of Adams, Brown,	)	
Cass, Champaign, Christian, Clark, Coles, Edgar, Fulton,	)	
Macon, Montgomery, Morgan, Moultrie, Pike,	)	
Sangamon, Schuyler, Scott and Shelby, Illinois.	)	

**AMEREN TRANSMISSION COMPANY OF ILLINOIS’  
RESPONSE IN OPPOSITION TO STOP THE POWER LINES COALITION’S MOTION  
FOR ADMINISTRATIVE LAW JUDGES TO TAKE  
ADMINISTRATIVE NOTICE OF CERTAIN GOVERNMENTAL DOCUMENTS**

This is Stop the Power Line Coalition’s (“Stop the Power”) third attempt to get certain documents into the evidentiary record. The Commission already has rejected Stop the Power’s eleventh-hour motion to submit testimony and exhibits—including several of the documents now at issue—outside of the Administrative Law Judges’ (“ALJs”) established case schedule. Certain of the documents were then marked as cross exhibits at hearing, but were not admitted into evidence. Stop the Power, however, wants a *third* bite at the evidentiary apple. It now asks the ALJs to take administrative notice of the previously-excluded exhibits, as well as other, new documents, many of which are of questionable provenance and all of which may be significant to the determination of issues raised by Stop the Power in this proceeding. These documents are not the sort of undisputed “facts” contemplated by the administrative notice rules, and Stop the Power has made no showing that any of the documents, or, more importantly, the facts contained within them, are the appropriate subject of administrative notice. Even if Stop the Power could make such a showing (it cannot), the timing of its request may ultimately result in prejudice to

ATXI because it has deprived ATXI (and the other parties to this proceeding) of the opportunity to refute the “facts” contained in the documents. With the exception of one document—a 2007 published National Resources Conservation Service (“NRCS”) circular that ATXI will not contest in an effort to narrow the issues at bar—Stop the Power’s motion should be denied.

### **PROCEDURAL BACKGROUND**

One day into the evidentiary hearing, Stop the Power filed an untimely motion requesting leave to submit “supplemental direct” testimony. (*See* STPL Mtn. to File Supp. Dir. Testimony, (filed May 13, 2013).) Stop the Power attached to the putative testimony several exhibits, including four of the documents now at issue—an aerial map with colored outlining and numbers, a certified warranty deed, topographical maps, and a report of vegetative practices. (*See id.*, STPL Exs. 8.2-8.5.) The ALJs denied the motion, and did not admit those exhibits.

Later, at hearing, Stop the Power again attempted to introduce two of the excluded exhibits—the aerial map and the certified warranty deed—during its cross-examination of ATXI witness Donnell Murphy. (*See* STPL Cross Exs. 12 & 13; STPL Mtn. Exs. 12.0 & 11.0.) It also attempted to introduce two of the documents at bar, a document alleged to be a property tax record for Clark County parcel number 13-09-26-00-300-009 and a NRCS 2007 policy circular. (*See* STPL Cross Exs. 19 & 21; STPL Mtn. Exs. 16.0 & 15.0.) Ms. Murphy testified she was not familiar with all four documents, and ATXI objected to their admission. The ALJs permitted Stop the Power the opportunity to brief the issue post-hearing.

The motion Stop the Power filed, however, seeks administrative notice not only of the four documents described above, but also of three *additional* documents not appended to the testimony of any Stop the Power witness or introduced during the cross-examination of any ATXI witness: topographical maps; a report of vegetative practices; and a document alleged to

be a property tax record for Clark County parcel number 13-09-22-00-400-001. (STPL Mtn. Exs. 13.0, 14.0 & 17.0.) Rather than provide the attestations of the pertinent records custodians in support of its motion, Stop the Power has asked the Commission to administratively notice the documents based on representations in its motion and the unsworn “Verification” of its witness, Mr. Perry D. Baird. (*See* Correspondence (filed May 17, 2013).)<sup>1</sup> Mr. Baird’s “Verification,” however appears to be additional testimony regarding how he obtained the documents, and neither he nor Stop the Power’s counsel are subject to cross-examination at this stage of proceeding.

### **ARGUMENT**

Stop the Power has attempted, in blunderbuss fashion, to saturate the record with what it believes to be “evidence” related to the federal floodplain easement issue. Its attempts to introduce the subject documents through Mr. Baird’s testimony have failed. Its attempts to introduce the documents through ATXI witnesses at hearing have failed. The Commission should likewise reject Stop the Power’s attempts to introduce the documents through administrative notice.

#### **A. The Documents Are Not the Proper Subject of Administrative Notice.**

The doctrine of judicial notice serves to ensure that judges “ought not to be more ignorant than the rest of mankind [and] should at least know what everyone else knows.” *Wheeler v. Aetna Cas. Sur. Co.*, 11 Ill. App. 3d 841, 854 (1st Dist. 1973). Indeed, the purpose of the rules of judicial notice is to dispense with the “usual method of establishing adjudicative facts through the introduction of evidence, ordinarily consisting of the testimony of witnesses” when certain

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<sup>1</sup> Stop the Power did not append the “Verification” to its motion, and there is no indication it served the “Verification” in accordance with the Commission’s Rules of Practice. *See* 83 Ill. Adm. Code § 200.150(b). ATXI did not receive service of the “Verification” or Stop the Power’s motion. For this reason alone, the Commission may disregard the “Verification” and deny the motion.

facts are *outside the scope of reasonable controversy*. See Fed. R. Evid. 201 advisory committee's note. (Fed. R. Evid. 201 is identical to Ill. R. Evid. 201.) "A high degree of indisputability is the essential prerequisite." *Id.* As such, the types of facts that are typically judicially noticed include well-known geographical facts, such as that a city is within a county, *People v. Meid*, 130 Ill. App. 2d 482 (2d. Dist. 1970), that a certain date occurred on a certain day of the week, *Schneider v. Vine Street Clinic*, 77 Ill. App. 3d 946 (4th Dist. 1979), or matters of common sense, such as that plastic bags make rustling noises. *People v. Bolender*, 24 Ill. App. 3d 804 (2d Dist. 1974).

Administrative notice, however, should not be used as a means of evading responsibility to prove matters in support of a party's position. See *National Aircraft Leasing, Ltd. v. American Airlines, Inc.*, 74 Ill. App.3d 1014, 1018 (1st Dist. 1979). As such, "[a] court will not take judicial notice of . . . evidence that may be significant in the proper determination of the issues between the parties." *Cook Cty. Bd. of Review v. Prop. Tax Appeal Bd.*, 339 Ill. App. 3d 529, 542 (1st Dist., 2003) (citing *People v. Mehlberg*, 249 Ill. App. 3d 499, 531 (5th Dist. 1993) (citing *Vulcan Materials Co. v. Bee Constr.*, 96 Ill. 2d 159, 166 (1983)); see also *People ex rel Comm'nrs. of Highways v. Bd. of Supervisors*, 122 Ill. App. 40 (2d Dist., 1905) ("The law which allows the court to act upon the existence of facts without proof should be applied with caution and never extended to facts about which any reasonable doubt exists.").

Stop the Power asks the Commission to take administrative notice of seven documents not addressed in the testimony of any Stop the Power witness or recognized by the testimony of any ATXI witness: (1) a certified warranty deed (STPL Mtn., ¶ 5(A), Ex. 11.0); (2) a published NRCS circular (STPL Mtn., ¶ 5(E), Ex. 15.0); (3) aerial maps with colored lines and numbers (STPL Mtn., ¶ 5(B), Ex. 12.0); (4) topographical maps (STPL Mtn., ¶ 5(C), Ex. 13.0); (5) a

report of vegetative practices (STPL Mtn., ¶ 5(D), Ex. 14.0); and (6) and (7) alleged Clark County property tax records (STPL Mtn., ¶¶ 5(F), (G), Exs. 16.0 & 17.0). These documents relate to the determination of disputed issues raised by Stop the Power related to a federal floodplain easement along ATXI's proposed Primary Route in Clark County. Thus, they "may be significant in the proper determination of the issues between the parties." *See Cook Cty. Bd. of Review*, 339 Ill. App. 3d at 542. For that reason alone, they are not the proper subject of administrative notice.

Additionally, the scope of Stop the Power's request is unclear. Presumably, it seeks notice of the documents in an effort to avail itself of the use of *all* of the facts contained therein. This is much different than seeking notice of the mere existence of a document or an isolated, undisputed fact. To extend notice to this degree allows a party to bootstrap a myriad of "facts" that ATXI may not have the opportunity to refute given that the evidentiary hearing has now come and gone. Surely, "[i]f a party is not informed of the facts of which the court is taking judicial notice, he is deprived of the opportunity to challenge the deductions drawn from such notice or to dispute the truth of the facts allegedly relied upon." *Cook County Bd. of Review v. Property Tax Appeal Bd.*, 339 Ill.App.3d 529, 542 (1st Dist. 2002). For this reason as well, Stop the Power's motion should be denied.

While ATXI has procedural concerns regarding all of the documents as described herein, as stated, for the purpose of narrowing the issues, it will not contest notice of the published NCRS policy circular. ATXI acknowledges that the warranty deed is certified, but its contents are not "undisputed facts," and so, for the reasons above, it is not the proper subject of administrative notice. The remaining documents also are not outside the scope of reasonable controversy, as

evinced by the necessity to resort to the untested and unsworn assertions in Stop the Power's motion and Mr. Baird's Verification to determine just what the documents are:

STPL Ex. 12.0 – Aerial map with colored lines and numbers. Stop the Power claims STPL Exhibit 12.0 is a map reflecting specific portions of Clark County, with certain parcels outlined, “prepared and generated by the Office of Supervisor of Assessments in Clark County . . . .” (STPL Mtn., ¶ 5(B).) Yet, there is nothing on the face of the map to indicate it is what Stop the Power purports it to be. It has no title, no legend, no date. Despite Stop the Power's representations, the name “Office of Supervisor of Assessments in Clark County” is absent from it. It is unclear who outlined the parcels depicted on the map, when they were outlined, the reason they were outlined, at whose direction they were outlined, or whether the outlines are accurate. There is no opportunity for ATXI to discover that information. Moreover, the map lies beyond the bounds of proper judicial notice. *People v. Clark*, 406 Ill. App. 3d 622, 632-33 (2d Dist. 2010) (finding judicial notice of the “*precise* location of a single city lot or subdivision within city lines” improper) (emphasis in original). The Commission should not take administrative notice of the annotated aerial map.

STPL Ex. 13.0 – Topographical maps. Stop the Power claims STPL Exhibit 13.0 is topographical maps of the “Robinson floodplain easement area, with elevation/contour lines . . . .” (STPL Mtn., ¶ 5(C).) Although the maps identify the NRCS, they are not certified and there is no indication they are the most recent available. Further, there is no indication the lines drawn on the maps are the “elevation/contour lines” Stop the Power represents them to be, nor is there any scale for those lines. Resort must be made to Stop the Power's motion for that information. Regardless, the precise elevations and contours of a parcel of private property are not facts “generally known” or “capable of ready determination,” *see* Ill. R. Evid. 201, and there

is no opportunity left for ATXI to discover information about the maps. Thus, the Commission also should not take administrative notice of the topographical maps.

STPL Ex. 14.0 – Report of vegetative practices. Stop the Power seeks administrative notice of what it calls a “certification report of vegetative practices.” (STPL Mtn., ¶ 5(D).) The document, however, is not certified, and nothing on its face suggests when it was created, the person who created it, whether it was published, or whether it is complete or part of a larger document. Again, ATXI is barred by the case schedule from discovering that information; it is left to resort only to the assertions in Stop the Power’s motion and its “Verification.” Those assertions are not undisputed. As such, the Commission should not take notice of the alleged report.

STPL Exs. 16.0 & 17.0 – Property tax records. Stop the Power also seeks administrative notice of what it claims to be property tax records for two parcels in Clark County. (STPL Mtn., ¶¶ 5(F), (G).) A cursory review of the documents, however, fails to substantiate Stop the Power’s representations. Neither record is certified. Neither indicates whether it is the most recent available, or when it was prepared. Even Stop the Power’s “Verification” fails to state when the records were obtained. The records contain handwritten notations, but there is no indication who made the notations, or when, or why. The records also appear incomplete. And, again, ATXI is precluded from discovering the missing information at this late stage. Further, facts contained in property tax assessors’ records have been held to be outside the scope of judicial notice, especially when no other evidence supporting the facts sought to be noticed is available. *See Abramson v. Abramson*, 2011 IL App. (1st) 092997-U ¶¶ 30-31 (holding the assessed value of property, as noted in property tax records, not a proper subject of judicial

notice). The Commission should not take administrative notice of the alleged property tax records.

**B. Stop the Power Has Not Complied with the Administrative Notice Rules.**

Stop the Power's motion makes cursory acknowledgment of the administrative and evidentiary rules that govern notice from the bench, but it stops short of making any substantive showing of compliance with them. Perhaps, as demonstrated above, this is because no such showing can be made regarding the documents at issue. For example, Stop the Power cites Section 200.640 of the Commission's Rules of Practice. (STPL Mtn., ¶ 1.) That section enumerates six categories of information of which the Commission may take administrative notice. 83 Ill. Adm. Code § 200.640(a)(1)-(6). The documents Stop the Power asks the Commission to take notice of do not fall within any of them. Rather, Stop the Power is left to rely solely on the seventh, "catchall" category: "All other matters of which the Circuit Courts of this State may take judicial notice." *Id.* § 200.640(a)(7). The problem, however, is that Stop the Power fails to demonstrate that "Circuit Courts of this State may take judicial notice" of any of the documents it asks this Commission to notice. As explained above, the documents are not properly subject to judicial or administrative notice.

Stop the Power also recognizes the applicability of the Illinois Rules of Evidence to Commission proceedings, and it cites Rule 201. (STPL Mtn., ¶¶ 2-4.) That rule provides "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Ill. R. Evid. 201(b). Stop the Power acknowledges the ALJs must be "supplied with the necessary information" to take administrative notice of any fact. (STPL Mtn., ¶ 3.) But it does not supply



the Commission with *any* of the information necessitated by Rule 201. It makes no attempt to show that the information contained in the documents at issue is “generally known” or “capable of accurate and ready determination.” Again, as explained above, it is not.

Instead, Stop the Power relies on the self-serving assertions of its counsel in brief and the unsworn statements of Mr. Baird, explaining the documents are what Stop the Power purports them to be. That Stop the Power deems such assertions necessary, however, alone removes the documents from the scope of proper judicial notice—it is elementary that a fact that is “generally known” or “capable of accurate and ready determination” does not require such explanation, and Stop the Power’s documents and the facts contained within them are anything but matters of general knowledge or ready determination. Instead, they are further testimony and exhibits that Stop the Power has not been able to get into the record by the usual means.

WHEREFORE, for the reasons set forth above, ATXI respectfully requests that the Commission deny Stop the Power’s motion. Should the Commission grant the motion, however, ATXI respectfully requests leave to conduct discovery related to the documents, to file responsive testimony related to the documents, and to call Mr. Baird for cross-examination related to the documents, and for such other and further relief as may be deemed equitable and just.

Dated: May 21, 2013

Respectfully submitted,

Ameren Transmission Company of Illinois

/s/ Albert D. Sturtevant

One of their Attorneys

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**CERTIFICATE OF SERVICE**

I, Albert D. Sturtevant, an attorney, certify that on May 21, 2013, I caused a copy of the foregoing *AMEREN TRANSMISSION COMPANY OF ILLINOIS' RESPONSE IN OPPOSITION TO STOP THE POWER LINES COALITION'S MOTION FOR ADMINISTRATIVE LAW JUDGES TO TAKE ADMINISTRATIVE NOTICE OF CERTAIN GOVERNMENTAL DOCUMENTS* to be served by electronic mail to the individuals on the Commission's Service List for Docket 12-0598.

/s/ Albert D. Sturtevant

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